BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KARRIE RUEBKE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,060,391
SALLY BEAUTY COMPANY	)	
Respondent	)	
AND	)	
	)	
SAFETY NATIONAL CASUALTY CORP.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the July 12, 2012 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

APPEARANCES

Garry L. Howard, of Wichita, Kansas, appeared for the claimant. Eric T. Lanham, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

ISSUES

The Administrative Law Judge (ALJ) found claimant's accident arose out of and in the course of her employment and ordered respondent to provide claimant with a list of two physicians from which to choose an authorized treating physician. The ALJ also ordered temporary total disability compensation (TTD) to be paid from April 5, 2012 through June 4, 2012 based on an average weekly wage of $492.73.

The respondent requests review of whether claimant's alleged injury arose out of and in the course of her employment and whether the ALJ exceeded his authority and jurisdiction in granting benefits. Respondent argues that claimant's injury arose out of a neutral risk with no particular employment or personal character, therefore the ALJ's Order should be reversed. Additionally, respondent argues that the accident occurred as the result of a normal activity of day-to-day living, i.e., walking. Therefore, the injury is not

compensable under the recent revision of the Kansas Workers Compensation Act (Act).

Claimant argues that the ALJ's Order should be affirmed. Claimant contends that the amount of walking and the speed at which she was forced to walk is significantly greater than what she does at home. Therefore, the injury arose out of the requirements of her job.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant has worked for respondent since September 30, 2011. Her position is as store manager and she is in charge of all of the day to day stocking, deliveries, cash handling and housekeeping duties. There are two other employees at the store.

On April 12, 2012, claimant and an associate were preparing to receive a truck delivery by getting as much as they could out of the back room and stocking the shelves to make room for the new merchandise that was coming in. Claimant testified that she was on her way back to the back room and as she rounded a corner her ankle rolled causing her ankle to snap and her to fall to the floor. Claimant testified that she did not slip, trip or run into anything to cause her fall.

The associate helped claimant to the back room and ice was put on her ankle. Claimant contacted the district manager and then called her mother to come and take her to urgent care. Claimant returned to work after her visit to urgent care and reported to her district manager the result of her visit. After checking with human resources, claimant was told that she would not be able to work under the restrictions that were imposed. She filled out an accident report and was sent home.

Claimant filed a workers compensation claim, which was denied by respondent's insurance company because claimant was at no greater risk than the general public at the time of the injury. It was argued that claimant was merely walking at the time her ankle rolled. There was nothing in her hands, nor was there any other reason for the injury to occur. Claimant testified that she works 8 hours a day and is on her feet for all but 15 minutes of that time. When she is at home claimant spends no more than 40 to 50 percent of her time walking or standing. Claimant applied for and was denied short-term disability. She was told that her claim was denied because her injury was work-related. Claimant has also had some of her medical costs covered by her health insurance company. However, they too have now denied the claim as being work-related.

Claimant met with Dr. David Hufford for an IME on May 22, 2012. Dr. Hufford opined that claimant had a classic inversion injury to the right ankle with sprain and persistent pain. He found that the prevailing factor in claimant's current symptomatology

was the classic inversion injury to the right ankle which occurred at her place of employment. However, he did not believe that the injury occurred because of work. He restricted claimant to sedentary activities only by ambulation assisted by crutches and non-weight bearing. His goal for claimant was to return her to weight bearing on the ankle through the continuation of physical therapy and discontinuing the cam walker.

Claimant testified that she received medical treatment from Dr. Naomi Shields and last saw her on June 12, 2012. Claimant was receiving physical therapy twice a week. Claimant did not work from April 5, 2012 to June 15, 2012 because her restrictions at the time could not be accommodated. Claimant returned to work on June 18, 2012 after respondent agreed to accommodate her restrictions.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 2011 Supp. 44-501b, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

---

[1] K.S.A. 2011 Supp. 501b and K.S.A. 2011 Supp. 44-508(h).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2011 Supp. 501b(b).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

K.S.A. 2011 Supp. 44-508(d) states:

> (d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.

There is nothing in this record contradicting claimant's allegation that she suffered an injury by accident which arose in the course of her employment. The injury occurred while claimant was moving supplies from the back room to the shelves in preparation for a new supply truck. However, a worker must also prove that the accident and resulting injury arose out of the employment, a more difficult task in this instance.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(B)(3)(A) states:

> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> (2) . . .
>
> (B) An injury by accident shall be deemed to arise out of employment only if:
>
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
>
> (3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
>
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

---

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

David W. Hufford, M.D., with Mid-America Orthopedics, performed an examination of claimant on May 22, 2012. In his report of that date, he answered several questions presented to him by claimant's attorney. He determined that the "prevailing factor" in claimant's current symptomatology was the injury suffered at work. He went on to state that there does not appear to be anything attributable to any specific circumstance at the work place which led to the injury. He stated: "The injury therefore occurred "at work" rather than "because of work."[5] Dr. Hufford's is the only medical causation opinion in this record.

It is clear that claimant was performing a work-related activity when her ankle rolled and she fell. It is equally clear that the act of walking is a normal activity of day-to-day living for this claimant. The question then arises, were the activities of claimant on that day normal, or did they exceed what she would normally anticipate in her daily life? It would be an unusual activity for one to spend all but 15 minutes of an 8 hour day on one's feet at home. The Board has held in the past that "normal activities of day-to-day living" should not be so broadly defined as to include injuries caused or aggravated by the strain or physical exertion of work.[6] However, the recent revisions to the Act appear to send a message from the Kansas legislature that a worker's ability to claim workers compensation benefits in Kansas has been limited. But, this Board Member notes that, even with the many recent changes to the Act, the Kansas legislature saw fit to leave in the Act the language which states: "It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act."[7] This legislative mandate would appear to encourage coverage by the Act even when a fact question such as this creates so close a question.

This Board Member finds that claimant has satisfied her burden of proving that the accidental injury in question arose both out of and in the course of her employment with respondent. The turning of the ankle was the prevailing factor causing the injury. This, coupled with the fact claimant's work required her to be on her feet for most of an 8 hour day indicates that claimant's walking at work was more than the normal activity of day-to-day living. The Order of the ALJ is affirmed.

---

[5] P.H. Trans., Cl. Ex. 5.

[6] *Bible v. Wichita Marriott*, No. 1,056,637, 2012 WL 758312 (Kan. WCAB Feb. 6, 2012).

[7] K.S.A. 2011 Supp. 44-501b(a).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied her burden of proving that she suffered an injury by accident which arose out of and in the course of her employment. The accident was the prevailing factor leading to the injury in question and the work activities being performed by claimant on that date exceeded that which would be expected during the normal activities of day-to-day living. The award of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated July 12, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2012.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

c: Garry L. Howard, Attorney for Claimant
ghoward@slapehoward.com

Eric T. Lanham, Attorney for Respondent and its Insurance Carrier
mvpkc@mvplaw.com
Elanham@mvplaw.com

Thomas Klein, Administrative Law Judge

[8] K.S.A.2011 Supp. 44-534a.